

SAN FRANCISCO BAY REGIONAL WATER QUALITY CONTROL BOARD

In the matter of:)	
)	
Atlantic Richfield Company)	Order R2-2012-0010
)	
And)	SETTLEMENT AGREEMENT AND
)	STIPULATION FOR ENTRY OF
Union Oil Company Of California)	ADMINISTRATIVE CIVIL LIABILITY
)	ORDER; ORDER
401 & 411 High Street, Oakland)	
Alameda County)	
)	
_____)	

Section I: INTRODUCTION

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (Stipulation) is entered into by and among the Assistant Executive Officer of the San Francisco Bay Regional Water Quality Control Board (Regional Water Board), on behalf of the Regional Water Board Prosecution Staff (Prosecution Team), the Union Oil Company Of California (Unocal) and the Atlantic Richfield Company (Atlantic Richfield), and is presented to the Regional Water Board, or its delegee, for adoption as an Order by settlement, pursuant to California Government Code section 11415.60. (For purposes of this Stipulation, the Regional Water Board, Unocal and Atlantic Richfield Company are collectively referred to as the "Parties," and Unocal and Atlantic Richfield are collectively referred to as the "Respondents").

Section II: RECITALS

1. Respondents are named as primary responsible parties in Site Cleanup Requirements (SCR) Order No. 90-133 (Order No. 90-133), and its subsequent amendments, issued pursuant to California Water Code section 13304 to address certain contamination at the properties located at 401 and 411 High Street, Oakland, Alameda County, California (the "Site").

2. On July 1, 2011, the Assistant Executive Officer of the Regional Water Board issued an Administrative Civil Liability Complaint, identified as Complaint Number R2-2011-0043, naming Respondents (the "Complaint"). The Complaint was based on California Water Code section 13323 and sought to assess administrative civil liability penalties pursuant to California Water Code section 13350, subdivision (e).

3. The Complaint alleges, inter alia, that Respondents failed to timely submit a draft Remedial Action Plan (dRAP) acceptable to the Executive Officer of the Regional Water Board in violation of Provision C.3.j of Order No. 90-133, as amended by SCR Order No. R2-2006-

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0084. A copy of the Complaint is attached hereto as Exhibit A and incorporated herein by reference. The Respondents deny any wrongful conduct alleged in the Complaint against either or both of them.

4. Based on evidence provided to the Prosecution Team by Respondents during settlement discussions conducted subsequent to the issuance of the Complaint, the Prosecution Team recommends reducing the number of days of violation alleged in the Complaint. This recommendation is reflected in this Stipulation and Order and is addressed in detail in the Amended Enforcement Policy Methodology, which is attached hereto as Exhibit B and incorporated herein by reference.

5. The Parties have engaged in settlement negotiations and agree to fully settle the alleged violations set forth in Exhibit A without administrative or civil litigation and by presenting this Stipulation to the Regional Water Board, or its delegee, for adoption as an Order by settlement, pursuant to California Government Code section 11415.60. The Prosecution Staff believes that the resolution of the alleged violations set forth in Exhibit A is fair and reasonable and fulfills all of its enforcement objectives, that no further action is warranted concerning those violations, except as provided in this Stipulation, and that this Stipulation is in the best interest of the public.

6. To resolve by consent and without further administrative proceedings the alleged violations set forth in Exhibit A, the Parties have agreed to the imposition of administrative civil liability penalties in the amount of \$143,253 against Respondents, which includes \$24,000 for staff costs.

Section III: STIPULATIONS

The Parties stipulate to the following:

7. **Jurisdiction:** The Parties agree that the Regional Water Board has subject matter jurisdiction over the matters alleged in this action and personal jurisdiction over the Parties to this Stipulation.

8. **Administrative Civil Liability:** Respondents shall each pay \$71,626.50 for a total of \$143,253 in stipulated administrative civil liability, which includes \$24,000 in staff costs, by separate checks made payable to the "San Francisco Bay Regional Water Quality Control Board" for deposit in the State Water Pollution Cleanup and Abatement Account no later than thirty (30) days following the Regional Water Board, or its delegee, executing this Order. The checks shall reference the Order number listed on page one of this Stipulation. The original signed checks shall be sent to Brian Thompson, San Francisco Bay Regional Water Quality Control Board, 1515 Clay Street, Suite 1400, Oakland, CA 94612, with copies to: Ann Carroll, Office of Enforcement, P.O. Box 100, Sacramento, CA 95812.

9. **Compliance with Applicable Laws:** Respondents understand that payment of administrative civil liability in accordance with the terms of this Order and/or compliance

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with the terms of this Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged in Exhibit A may subject Respondents to further enforcement, including additional administrative civil liability.

10. **Party Contacts for Communications related to this Stipulation and Order:**

For the Regional Water Board:

Brian Thompson
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, 14th Floor
Oakland, CA 94612
BRThompson@waterboards.ca.gov
(510) 622-2422

For Unocal:

Michelle Bacon
Chevron Law Department
Chevron Corporation
6001 Bollinger Canyon Road, Room T2192
San Ramon, CA 94583
(925) 842-8807

For Atlantic Richfield:

Asteghik Khajetoorians
BP America Inc.
6 Centerpointe Drive, 5th Floor
La Palma, California 90623
(714) 228-6772

11. **Attorney's Fees and Costs:** Each Party shall bear all attorneys' fees and costs arising from the Party's own counsel in connection with the matters set forth herein.

12. **Matters Covered by this Stipulation:** Upon adoption by the Regional Water Board, or its delegee, as an Order, this Stipulation represents a final and binding resolution and settlement of all claims, violations or causes of action alleged in Exhibit A or which could have been asserted based on the specific facts alleged in Exhibit A against Respondents. The provisions of this Paragraph are expressly conditioned on the Respondents' full payment of administrative civil liability by the deadline specified in Paragraph 8 herein.

13. **Denial of Liability:** In settling this matter, Respondents expressly deny the allegations described in Exhibit A and make no admission or representation as to the appropriateness of the liability determination under the Water Quality Enforcement Policy as set forth in Exhibit B. Neither this Stipulation nor any payment pursuant to the Order shall

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constitute evidence of, or be construed and/or interpreted as, a finding, adjudication, or acknowledgement of any fact, law or liability, nor shall it be construed as an admission of violation of any law, rule, or regulations. However, this Stipulation and/or any actions of payment pursuant to the Order may constitute evidence in actions seeking compliance with this Stipulation.

14. **Public Notice:** Respondents and the Regional Water Board Prosecution Team understand that this Stipulation and Order must be noticed for a 30-day public review and comment period prior to consideration by the Regional Water Board, or its delegee. In the event objections are raised during the public review and comment period, the Regional Water Board or its delegee may, under certain circumstances, require a public hearing regarding the Stipulation and Order. In that event, the Parties agree to meet and confer concerning any such objections.

15. **Addressing Objections Raised During Public Comment Period:** The Parties agree that the procedure contemplated for adopting the Order by the Regional Water Board and review of this Stipulation by the public is lawful and adequate. In the event procedural objections are raised prior to the Order becoming effective, the Parties agree to meet and confer concerning any such objections.

16. **Interpretation:** This Stipulation and Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party. Respondents are represented by counsel in this matter.

17. **Modification:** This Stipulation and Order shall not be modified by any of the Parties by oral representation made before or after its execution. All modifications must be in writing, signed by all Parties, and approved by the Regional Water Board, or its delegee.

18. **If the Order Does Not Take Effect:** In the event that this Order does not take effect because it is not approved by the Regional Water Board, or its delegee, or is vacated in whole or in part by the State Water Resources Control Board or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the Regional Water Board to determine whether to assess administrative civil liabilities for the underlying alleged violations, unless the Parties agree otherwise. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence in the hearing. The Parties agree to waive any and all objections based on settlement communications in this matter, including, but not limited to:

- a. Objections related to prejudice or bias of any of the Regional Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the Regional Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions as a consequence of reviewing the Stipulation and/or the Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on the violations alleged in Exhibit A in this matter; or

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- b. Laches or delay or other equitable defenses based on the time period for administrative or judicial review to the extent this period has been extended by these settlement proceedings.

19. **Waiver of Hearing:** Respondents have been informed of the rights provided by California Water Code section 13323, subdivision (b), and hereby waive their right to a hearing before the Regional Water Board prior to the adoption of the Order.

20. **Waiver of Right to Petition:** Respondents hereby waive their right to petition the Regional Water Board's adoption of the Order for review by the State Water Resources Control Board, and further waive their rights, if any, to appeal the same to a California Superior Court and/or any California appellate level court.

21. **Unocal's and Atlantic Richfield's Covenant Not to Sue:** Respondents covenant not to sue or pursue any administrative or civil claim(s) against any State Agency or the State of California, their officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any matter expressly addressed by this Stipulation and Order.

22. **Authority to Bind:** Each person executing this Stipulation in a representative capacity represents and warrants that he or she is authorized to execute this Stipulation on behalf of and to bind the entity on whose behalf he or she executes the Stipulation.

23. **Counterpart Signatures:** This Stipulation may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document.

24. **Effective Date:** This Stipulation is effective and binding on the Parties upon the entry of this Order by the Regional Water Board, or its delegee, which incorporates the terms of this Stipulation.

IT IS SO STIPULATED.

**California Regional Water Quality Control Board,
San Francisco Region Prosecution Team**

Date: 2/14/12

By: 
Dyan C. Whyte
Assistant Executive Officer

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Order No. R2-2012-0010
Atlantic Richfield Company and Union Oil Company of California

Union Oil Company of California

Date: FEB 23, 2012

By: 

Name Grace N. Chan

Title Assistant Secretary

Atlantic Richfield Company

Date: _____

By: _____

Name

Title

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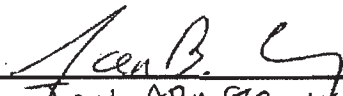
Union Oil Company of California

Date: _____

By: _____
Name
Title

Atlantic Richfield Company

Date: 23 FEBRUARY 2012

By: 
Name JON ARMSTRONG
Title TEAM LEADER, LAND + LEGAL

ORDER

**HAVING CONSIDERED THE ALLEGATIONS AND THE PARTIES' STIPULATIONS,
THE REGIONAL WATER BOARD, OR ITS DELEGEE, FINDS THAT:**

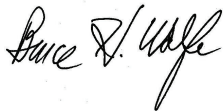
25. The Regional Water Board incorporates the foregoing Stipulation, set forth in Paragraphs 6 through 24 above, by this reference, as if set forth fully herein.

26. In accepting this Stipulation, the Regional Water Board has considered, where applicable, each of the factors prescribed in California Water Code section 13327. The Regional Water Board's consideration of these factors is based upon information obtained by the Prosecution Team in investigating the allegations in Exhibit A, or otherwise provided to the Regional Water Board. This settlement also recovers the costs incurred by the Prosecution Team in investigating and pursuing enforcement of the allegations set forth in Exhibit A as "other matters as justice may require."

27. This is an action to enforce the laws and regulations administered by the Regional Water Board. The Regional Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 *et seq.*), in accordance with section 15321(a)(2), title 14, of the California Code of Regulations.

28. The Executive Officer is authorized to refer this matter directly to the Attorney General for enforcement if Unocal or Atlantic Richfield fails to perform any of its obligations under the Order.

Pursuant to California Water Code section 13323 and California Government Code section 11415.60, **IT IS HEREBY ORDERED** on behalf of the California San Francisco Bay Regional Water Quality Control Board, that the foregoing Stipulation is accepted in settlement of this action.



Bruce H. Wolfe
Executive Officer

Digitally signed by Bruce Wolfe
Date: 2012.04.09 18:09:43 -07'00'
Date: _____

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EXHIBIT A

The Complaint

**STATE OF CALIFORNIA
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

COMPLAINT NO. R2-2011-0043

**ADMINISTRATIVE CIVIL LIABILITY
IN THE MATTER OF
ATLANTIC RICHFIELD COMPANY
AND
UNION OIL COMPANY OF CALIFORNIA
401 & 411 HIGH STREET
OAKLAND, ALAMEDA COUNTY**

This Complaint is issued under the authority of California Water Code (CWC) section 13323 to Atlantic Richfield Company (ARCO) and Union Oil Company of California (UNOCAL) (collectively Dischargers) to assess administrative civil liability pursuant to CWC section 13350(e). The Complaint alleges that the Dischargers failed to timely submit a draft Remedial Action Plan (dRAP) acceptable to the Executive Officer of the California Regional Water Quality Control Board, San Francisco Bay Region ("Regional Water Board") in violation of Provision C.3.j of Site Cleanup Requirements (SCR) Order No. 90-133, as amended by SCR Order No. R2-2006-0084.

The Assistant Executive Officer of the Regional Water Board hereby gives notice that:

1. ARCO and UNOCAL are named as primary responsible parties in SCR Order No. 90-133, and its subsequent amendments, issued pursuant to CWC section 13304 to address contamination at the properties located at 401 and 411 High Street, Oakland, Alameda County, California (Site).¹ BP, P.L.C. (BP) is the parent company of ARCO; and UNOCAL is a wholly owned subsidiary of Chevron Corporation (Chevron).
2. The Dischargers are alleged to have violated provisions of the law for which the Regional Water Board may impose administrative civil liability pursuant to CWC section 13350(e). This Complaint proposes \$154,307 in administrative civil liabilities, including \$24,000 in staff costs consistent with the State Water Resources Control Board's Enforcement Policy, against the Dischargers based on the considerations described herein.
3. Unless waived, the Regional Water Board will hold a hearing on this matter on September 14, 2011, in the Elihu M. Harris State Building, First Floor Auditorium,

¹ SCR Order No. 90-133 also named Foster Chemical Company as a primary responsible party. Foster Chemical Company was not named as a party to this Complaint based on Enforcement Staff's belief that Foster Chemical Company is no longer a viable legal entity, and that there is insufficient information to determine the true identity of Foster Chemical Company. Nothing in this Order shall be construed to limit the rights of ARCO or UNOCAL to seek contribution and/or indemnity from Foster Chemical Company and/or any other party they believe may be responsible for a share of cleanup costs and/or this administrative civil liability.

1515 Clay Street, Oakland, California, 94612. The attached Hearing Procedure provides important information on how those proceedings will be conducted and deadlines by which parties must take specific actions and/or submit information.

STATEMENT OF PROHIBITIONS AND REQUIREMENTS APPLICABLE TO DISCHARGERS

4. Pursuant to CWC section 13304, any person who has ... caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the Regional Water Board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.
5. On September 19, 1990, the Regional Water Board adopted SCR Order No. 90-133, which ordered the Dischargers, pursuant to CWC section 13304, to cleanup and abate petroleum contamination in groundwater at 301, 401, and 411 High Street in Oakland.² A true and correct copy of SCR Order No. 90-133 is attached to this Complaint as Exhibit A.
6. On December 13, 2006, the Regional Water Board adopted SCR Order No. R2-2006-0084, which amended SCR Order No. 90-133. In pertinent part, SCR Order No. R2-2006-0084 added Provision C.3.j, which required the Dischargers to submit a dRAP, acceptable to the Executive Officer of the Regional Water Board, by October 15, 2007. A true and correct copy of SCR Order No. R2-2006-0084 is attached to this Complaint as Exhibit B.
7. By letters dated October 15, 2007, the Regional Water Board extended the dRAP deadline to May 15, 2008. True and correct copies of the October 15, 2007 letters are attached to this Complaint as Exhibit C.

ALLEGED VIOLATIONS OF PROHIBITIONS AND REQUIREMENT APPLICABLE TO THE DISCHARGERS

8. The Dischargers failed to submit a dRAP, acceptable to the Executive Officer of the Regional Water Board, by May 15, 2008, in violation of Provision C.3.j of SCR Order No. 90-133, as amended.

FACTUAL BASIS FOR THE ALLEGED VIOLATIONS:

9. On May 15, 2008, UNOCAL submitted a dRAP for the property located at 401 High Street, Oakland, California (401 dRAP), and ARCO submitted a dRAP for the property

² SCR Order No. 98-041 amended SCR Order No. 90-133 to remove the 301 High Street, Oakland, California property.

located on 411 High Street, Oakland, California, (411 dRAP) to the Regional Water Board. The Executive Officer, by and through his authorized delegee, determined both the 401 dRAP and the 411 dRAP to be unacceptable. Subsequent to that determination, Regional Water Board staff met with the Dischargers on July 29, 2008 to discuss the reasons the Executive Officer found the 401 dRAP and the 411 dRAP to be unacceptable.

10. On December 15, 2008, Regional Water Board staff issued a Notice of Violation (NOV) to the Dischargers that provided notice that the 401 dRAP and 411 dRAP submitted on May 15, 2008 were unacceptable for the following reasons:
 - a) The Dischargers' position that the Site's groundwater is non-potable is not defensible, given the groundwater's drinking water beneficial use designation in the Basin Plan.
 - b) The Dischargers did not include benzene as a chemical of concern (COC) in groundwater. Staff found there was no justification for the exclusion of benzene based on an incomplete exposure pathway, when the listing of other COCs clearly indicated that this pathway was complete.
 - c) The risk assessment modeling factor for benzene did not appropriately reflect site conditions. The Dischargers' choice of soil vapor extraction coupled with air sparging did not consider the potential impact of the large volume of air (required for its effectiveness) on the lateral and vertical migration of contamination in groundwater.

The Dischargers objected to the December 15, 2008, NOV via a letter dated February 9, 2009.

11. On June 16, 2009, in another letter to the Dischargers, Regional Water Board staff affirmed that the 401 dRAP and 411 dRAP submitted on May 15, 2008 remained unacceptable to the Executive Officer. The 401 dRAP and 411 dRAP did not reflect the drinking water beneficial use designation at the Site, and the proposed cleanup goals did not factor in estuarine ecological receptors that may be impacted by contaminated groundwater discharging from the Site. Further, given the presence of high contaminant concentrations at the Site and ongoing offsite contaminant migration, Staff found that long-term monitoring/monitored natural attenuation was not a viable option when more aggressive remedial actions could be feasibly implemented. The Dischargers submitted a revised 401 dRAP and a revised 411 dRAP for the Site on January 8, 2010.
12. On August 19, 2010, ARCO submitted to the Regional Water Board a dRAP acceptable to the Executive Officer for the property located on 411 High Street, Oakland, California. On October 28, 2010, UNOCAL submitted to the Regional Water Board a dRAP acceptable to the Executive Officer for the property located at 401 High Street, Oakland, California—896 days late.
13. Paragraphs 9 through 12 above describe the formal communications between the Dischargers and Regional Water Board Staff. From May 15, 2008, through October 28, 2010, Regional Water Board staff also had numerous informal communications with the Dischargers by means of meetings, phone calls, and email exchanges to explain and clarify the bases for the unacceptability of the May 15, 2008 and January 8, 2010, 401

and 411 dRAPs. It is estimated that Staff incurred more than 368 hours of staff time attempting to obtain a dRAP for the Site, acceptable to the Executive Officer, from the Dischargers.

WATER CODE SECTIONS UPON WHICH LIABILITY IS BEING ASSESSED DUE TO NONCOMPLIANCE WITH PROVISION C.3.j OF SCR ORDER NO. 90-133, AS AMENDED BY SCR ORDER NO. R2-2006-0084.

14. Pursuant to CWC section 13350(a)(1), any person who violates a cleanup and abatement order issued by the Regional Water Board, shall be civilly liable under CWC section 13350(e). CWC section 13350(e)(1) states that civil liability may be imposed administratively by the Regional Water Board in an amount not to exceed five thousand dollars (\$5,000) for each day in which the violation occurs.

FACTORS CONSIDERED IN DETERMINING ADMINISTRATIVE CIVIL LIABILITY

15. On November 17, 2009, the State Water Resources Control Board (State Water Board) adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Officer of Administrative Law and became effective on May 20, 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in CWC section 13327. The entire Enforcement Policy can be found at:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final11709.pdf

The specific required factors in CWC section 13327 are the nature, circumstances, extent, and gravity of the violations or violations, whether the discharge is susceptible to cleanup or abatement, and the degree of toxicity of the discharge. With respect to the violator, the required factors are the ability to pay, the effect on the violator's ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of the violation, the degree of culpability, economic benefit or saving, if any, resulting from the violation, and other matters that justice may require.

The Enforcement Policy sets forth an approach to determine liability using a methodology that considers the following: the potential harm to beneficial uses; the physical, chemical, biological or thermal characteristics of the discharge; the discharge's susceptibility to cleanup; the violation's deviation from requirements; the Discharger's culpability; cleanup and the Discharger's cooperation; the history of violations; the Discharger's ability to pay; other factors as justice may require; and economic benefit from the avoidance or delay of implementing requirements. These factors address the statute-required factors and are used to calculate penalties consistent with both the CWC and the Enforcement Policy.

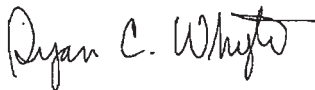
16. Regional Water Board Enforcement staff used the Enforcement Policy methodology to calculate the proposed administrative civil liability, which is described in detail in Attachment D. Attachment D is incorporated by this reference as if fully set forth herein.

MAXIMUM ADMINISTRATIVE CIVIL LIABILITY THAT MAY BE IMPOSED

17. Because the Dischargers failed to submit a sufficient dRAP for the Site until 896 days after the deadline for doing so, pursuant to CWC section 13350(e)(1), the total maximum administrative civil liability that may be imposed for the violation alleged in this Complaint is \$4,480,000.

PROPOSED CIVIL LIABILITY

18. Based on the consideration of the above facts and the Enforcement Policy methodology, the Assistant Executive Officer of the Regional Water Board proposes that an administrative civil liability be imposed in the amount of \$154,307. Of this amount, \$130,307 is for the estimated economic benefit plus 10 percent the Dischargers received and \$24,000 is for recovery of staff costs. The Enforcement Policy requires that the proposed liability amount be, at a minimum, 10 percent higher than the economic benefit received as a result of the alleged violations. Therefore, it is appropriate to propose the "minimum" liability required by the Enforcement Policy plus staff costs.
19. If this matter proceeds to hearing, the Assistant Executive Officer reserves the right to amend the proposed amount of civil liability to conform to the evidence presented, including, but not limited to, increasing the proposed amount to account for the costs of enforcement (including staff, legal and expert witness costs) incurred after the date of the issuance of this complaint through completion of the hearing.
20. Issuance of this Complaint is exempt from the provisions of the California Environmental Quality Act (Public Resources Code 21000 et seq.) in accordance with section 15321 of Title 14, California Code of Regulations.



Dyan C. Whyte
Assistant Executive Officer

July 1, 2011
Date

Attachment A: SCR Order No. 90-133
Attachment B: SCR Order No. R2-2006-0084
Attachment C: October 15, 2007 letters
Attachment D: Specific Factors Considered to Determine Administrative Civil Liability

EXHIBIT B

AMENDED ENFORCEMENT POLICY METHODOLOGY

Specific Factors Considered to Determine Administrative Civil Liability

Each factor in the Enforcement Policy methodology and its corresponding category, adjustment, and/or amount for the non-discharge violation alleged in Administrative Civil Liability (ACL) Complaint No. R2-2011-0043 (Complaint) is presented below:

Violation: Failure to submit a draft Remedial Action Plan (dRAP), acceptable to the Executive Officer of the Regional Water Board, by May 15, 2008:

Adjustments to Determination of Initial Liability

a) **Specific Factor:** Potential Harm to Beneficial Uses

Category: Minor

Discussion: The potential for harm to groundwater and San Francisco Bay was minor. During the delay, groundwater and Oakland Estuary beneficial uses were negatively impacted by the unpermitted discharge of contaminants to soils and groundwater below the Site, and by their transport to the Estuary. The rate of transmission to the Estuary, however, was likely low.

b) **Specific Factor:** Deviation from requirement

Category: Moderate

Discussion: The deviation from requirement is “moderate” because the intended effectiveness of the requirement was partially compromised. The Dischargers submitted an acceptable dRAP for 411 High Street on August 18, 2010 and an acceptable dRAP for 401 High Street on October 28, 2010. Provision C.3.j required the Dischargers to submit a dRAP that addressed both properties by October 15, 2007, which was subsequently extended to May 15, 2008. The Executive Officer, by and through his authorized delegee, determined both the 401 dRAP and the 411 dRAP to be unacceptable. Subsequent to that determination, Regional Water Board staff met with the Dischargers on July 29, 2008, to discuss the reasons the Executive Officer found the 401 dRAP and the 411 dRAP to be unacceptable. The Dischargers’ submitted the 401 dRAP 820 days after this July 29, 2008, meeting, which delayed cleanup work on the Site.

c) **Specific Factor:** Days of Violation

Amount: 33 days

Discussion: The Enforcement Policy allows for a reduction in days of violation when it can be determined that the Dischargers' on-going violation did not result in economic benefit that can be measured on a daily basis. The requirement to prepare and submit a dRAP does not require work on a daily basis. Therefore, the Discharger did not receive a daily economic benefit and it is appropriate to apply the Alternative Approach—Multiple Day Violations factor to this violation.

The Dischargers submitted the required dRAP 820 days after the July 29, 2008, meeting with Regional Water Board staff. Pursuant to the Enforcement Policy, the days of violations is reduced to 33 days.

d) **Civil Liability:** Initial amount of ACL assessed for this violation

Amount: \$41,250

Discussion: The maximum \$5,000 per day statutory requirement is multiplied by the reduced number of days—33 days—giving a liability amount of \$165,000. Considering the specific factors (a) through (c) above, the liability amount is multiplied by a factor of 0.25, resulting in the above initial amount of ACL.

Adjustments to Determination of Initial Liability

e) **Specific Factor:** Culpability

Adjustment: 1.2

Discussion: The Dischargers were actively negligent in failing to timely submit an acceptable dRAP for the Site. The Dischargers continued to propose a “monitored natural attenuation” remedial approach more than two years after being informed by Regional Water Board staff that such an approach was unacceptable. The Dischargers did not revise the 401 or 411 dRAP to address the drinking water beneficial use for site groundwater. Additionally, the risk assessment modeling factors in the 401 and/or 411 dRAP did not appropriately reflect Site conditions. The proposed cleanup goals did not factor in estuarine ecological receptors that may be impacted by contaminated groundwater discharging from the Site.

f) **Specific Factor:** Cleanup and Cooperation

Adjustment: 1.1

Discussion: ARCO maintained an interim groundwater remediation system at the 411

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High Street property on or about and between May 15, 2008 and October 28, 2010, as required by SCR Order No. 90-133, as amended. The interim remediation measures, however, were not optimally set to address groundwater impacts at the Site. UNOCAL did not operate any remediation systems at the 401 High Street property on or about and between May 15, 2008 and October 28, 2010. Additionally, the Dischargers' conduct required multiple meetings with Regional Water Board staff, and the issuance of letters and a NOV to obtain an acceptable dRAP for the Site.

g) **Specific Factor:** History of Violations

Adjustment: 1

Discussion: The Regional Water Board has not issued other formal enforcement actions against the Dischargers for violations similar to the one alleged in the Complaint.

h) **Total Base Liability:** The adjusted ACL for the alleged violation.

Amount: \$54,450 (Initial Liability (\$41,250) * Adjustments ((1.2) * (1.1) * (1))

i) **Specific Factor:** Ability to Pay and to Continue in Business

Adjustment: 1

Discussion: The Dischargers will be able to pay the proposed civil liability and continue in business. ARCO is a wholly owned subsidiary of BP. From 2007 through 2010, BP reported operating revenue of about \$1.18 trillion, and a total net income of about \$54.9 billion. UNOCAL is a wholly owned subsidiary of Chevron Corporation. Chevron Corporation's 2010 Annual Report reported a net income of \$19 billion and operating revenue of \$198 billion. The Regional Water Board has no evidence that the Dischargers would be unable to pay the proposed liability set forth in this Complaint or that the amount of the liability would cause undue financial hardship.

j) **Specific Factor:** Other Factors as Justice May Require

Discussion: The Enforcement staff time incurred to prepare this Complaint and supporting information is estimated to be 160 hours. Based on an average cost to the State of \$150 per hour, the total staff cost is estimated to be \$24,000.

k) **Specific Factor:** Economic Benefit

Discussion: The Dischargers obtained an estimated economic benefit of \$108,412 by delaying the submittal of an acceptable dRAP for the Site. By not timely submitting an acceptable dRAP, the Dischargers deferred expenditures associated with the required soil and groundwater cleanup at the Site. Staff estimated the economic benefit based on a cost analysis provided by ARCO's consultant for the proposed soil vapor extraction, dual

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phase extraction, and in-situ anaerobic and/or chemical oxidation alternatives at the Site¹ and a cost analysis provided by UNOCAL's consultant for the proposed bioremediation with sulfate addition alternative at the Site.²

l) **Civil Liability: Minimum Liability Amount**

Amount: \$119,253

Discussion: The Enforcement Policy requires that the adjusted Total Base Liability Amount be, at a minimum, 10 percent higher than the economic benefit received as a result of the alleged violation. The Dischargers' estimated economic benefit plus 10 percent is \$119,253. Because the economic benefit received exceeds the Adjusted Total Base Liability, the minimum liability amount that must be imposed is \$119,253.

m) **Civil Liability: Maximum Liability Amount**

Amount: \$4,480,000

Discussion: The maximum liability that may be imposed under CWC section 13350 is \$4,100,000. This is based on the maximum liability of \$5,000 per day for 820 days of violation (from July 30, 2008, through October 28, 2010, the date the Dischargers submitted an acceptable dRAP for the Site).

Final Proposed Civil Liability

The total final liability amount proposed for the late reporting violation is \$143,253 (the sum of the economic benefit received plus 10 percent and staff costs) based on the considerations discussed in detail above.

The proposed liability is less than three percent of the maximum liability that the Regional Water Board has the discretion to impose.

¹ May 28, 2010, "Technical Report – Final Remedial Action Plan 401/411 High Street, Oakland, California, Section 3.4 p 3-13." URS.

² May 28, 2010, Technical Report – Final Remedial Action Plan 401/411 High Street, Oakland, California, Section 3.4, pp. 3-13. URS.